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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RUFUS HERNANDEZ,

Defendant and Appellant.

F058295

(Super. Ct. No. 09CM8699)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. James LaPorte, Judge.

James Lozenski, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

* Before Hill, Acting P.J., Kane, J., and Poochigian, J.

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STATEMENT OF THE CASE

On June 25, 2009, appellant, Rufus Hernandez, was charged in an information with being an ex-convict unlawfully on the grounds of a state prison (Pen. Code, § 4571, count 1),¹ sending a controlled substance onto the grounds of a state prison (§ 4573, counts 2 & 3), and bringing four knives and a tree saw onto state prison grounds (§ 4574, subd. (a), counts 4 through 8). The information alleged appellant had a prior serious felony conviction under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and two prior prison term enhancements (§ 667.5, subd. (b)). On June 11, 2009, appellant waived his right to a preliminary hearing.

On July 15, 2009, appellant made a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Appellant complained his attorney, Mr. Gomez-Vidal, gave him nothing positive, failed to see appellant when he said he would, had not read the police report, and wanted appellant to accept a plea bargain. The court asked appellant if he understood, that as a matter of law, defense counsel had to tell appellant any deal offered by the prosecutor and appellant's chances of prevailing at trial. Appellant said he understood.

Appellant asserted he filed two *Marsden* motions against his attorney and had conflicts with him. Gomez-Vidal explained he never indicated to that appellant he had not read the police report and did not tell appellant anything that was false. Gomez-Vidal had discussed an issue concerning how the strike allegation was a serious felony. An investigator was appointed to appellant's case on July 6, 2009. Although the investigator had not yet met with appellant, Gomez-Vidal anticipated he would do so within a week.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

Gomez-Vidal had discussions with appellant concerning his case including the prosecutor's plea bargain offer. Gomez-Vidal explained he would zealously represent appellant even though there was a plea offer and he would be ready to go to trial if appellant refused the offer. Gomez-Vidal had read the reports, talked to appellant and the prosecutor, and an investigator appointed, and was planning to have the investigator interview witnesses as soon as possible. Gomez-Vidal explained it was customary for him to have the investigator meet with defendants initially to provide a neutral observer concerning appellant's comments and so counsel would not get called as a witness in the case itself. Gomez-Vidal denied holding a grudge against appellant.

Appellant said he still felt he was not being properly represented by Gomez-Vidal. Appellant complained that he felt he was guilty in Gomez-Vidal's eyes and heard nothing positive from him. The court found no grounds for granting a *Marsden* motion and no complete breakdown of the attorney-client relationship.

On July 24, 2009, appellant entered into a plea agreement in which he would admit counts 1 and 2 in exchange for the dismissal of the other allegations. Appellant would receive a stipulated sentence of the upper term of four years on count 2, the violation of section 4573, and one-third the midterm of two years on count 1, the violation of section 4571. The court explained the consequences of appellant's plea, including that he would receive a sentence of four years on count 2 and a consecutive sentence of eight months on count 1. The court advised appellant of, and appellant waived, his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.

Appellant indicated he understood the nature of the charges against him, had sufficient time to discuss the matter with his attorney, and that his attorney had discussed possible defenses to the allegations. The court determined appellant was entering the plea agreement freely and voluntarily. The parties stipulated to the prosecutor's

explanation of the factual basis for appellant's plea.² Appellant pled no contest to counts 1 and 2. Counsel requested immediate sentence and indicated appellant was waiving his right to appeal the sentence and any issue concerning section 654.³

The court sentenced appellant to the upper term of four years on count 2 and a consecutive term of eight months on count 1.⁴ The court granted the prosecutor's motion to dismiss the remaining allegations. Appellant filed a timely notice of appeal but did not obtain a certificate of probable cause.⁵ (CT 44-46)!

² If called to testify, prosecution witnesses would show that on May 13, 2009, appellant, who was on active parole, drove onto the prison grounds without permission of prison officials, including the prison warden. Appellant had in his possession a usable amount of methamphetamine.

³ Although defense counsel indicated appellant was waiving his right to appeal sentencing issues, no express waiver of this right was taken from appellant. Appellant did not affirmatively acknowledge or otherwise indicate he was waiving any appellate right.

⁴ The abstract of judgment incorrectly refers to appellant's sentence on count 2 as being eight months and his sentence on count 1 as being four years.

⁵ The Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender, and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment violates the intent of the Legislature and equal protection principles. We deem these contentions raised here.

We explained in the recent case of *People v. Rodriguez* (2010) 183 Cal.App.4th 1 however, that the amendment is not presumed to operate retroactively and does not violate equal protection under law. Appellant is, therefore, not entitled to additional conduct credit under the amendment to section 4019. There was no probation report. The information, however, alleged a prior conviction for robbery. Although appellant did

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on December 22, 2009, we invited appellant to submit additional briefing.

Appellant replied with two letter briefs complaining about his counsel's representation and the trial court's denial of his *Marsden* motion. Appellant further complains his codefendant received a shorter sentence than appellant's sentence and that his codefendant also had a qualifying prior serious felony conviction pursuant to the three strikes law. Attached to appellant's second letter is a letter from the California Department of Corrections (CDC) noting that the abstract of judgment inaccurately reflects that appellant's sentence on count 2 is eight months and his sentence on count 1 is four years.

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decision making is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm

not admit this allegation, if it is accurate, appellant would be disqualified from receiving presentence credits even if they could be applied retroactively because this conviction is a serious felony (§ 1192.7, subd. (c)(19)).

the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

Appellant has failed to affirmatively demonstrate his counsel was ineffective or that the trial court erred in denying his *Marsden* motion. Also, appellant failed to obtain a certificate of probable cause and cannot attack his plea agreement. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 77-79.)

We agree with the observation by CDC that there is an error in the abstract of judgment. Although the clerk's minute order correctly reflects that appellant's sentence on count 2 is four years and his sentence on count 1 is a consecutive term of eight months, the abstract of judgment reverses the sentences. This does not reflect the court's sentence or the terms of the plea agreement and clearly constitutes clerical error. Appellate courts have inherent power to correct clerical errors contained in an abstract of judgment that do not accurately reflect the judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181,188.)

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues other than the clerical error noted above.

DISPOSITION

The case is remanded for the trial court to prepare an amended abstract of judgment reflecting that appellant's sentence on count 2 is four years and his sentence on count 1 is a consecutive term of eight months and to forward the amended abstract of judgment to the appropriate authorities. The judgment is affirmed.